



Tuesday, October 2, 2012

11:00 AM - 12:30 PM

505 – Don't Bite the Hand that Feeds You: Managing the Legal - HR Relationship

Darren Chiappetta

Associate Counsel, Employment Law
Darden Restaurants, Inc.

Eric de los Santos

Asst. General Counsel, Director of Employment Law
TrueBlue, Inc.

Richard Sedory

General Counsel, Vice President Administration
Transtar Industries, Inc.

Courtney Thompson

Vice President-Employment Counsel
Lender Processing Services, Inc.

Faculty Biographies

Darren Chiappetta

Darren S. Chiappetta is associate counsel, employment law for Darden Restaurants. He provides support and counseling for employment-related issues such as EEOC/agency claims, alternative dispute resolution, and employment lawsuits for all of Darden's brands. He also partners closely with human resources, benefits, and operations teams to provide guidance regarding federal and state wage and hour laws, employment investigations, leaves of absence, ADA accommodations, as well as hiring and disciplinary procedures.

Prior to Darden, Mr. Chiappetta worked for Walt Disney Parks and Resorts. He most recently served in a human resources capacity as manager, employee relations for the Disneyland Resort, where he provided leadership and guidance to a team responsible for conducting internal investigations, managing medical and religious accommodations, and responding to external agency inquiries and investigations. He held a similar role in Orlando at the Walt Disney World Resort.

Before returning to Disney, Mr. Chiappetta was an associate attorney at the Orlando-based firm of Foley & Lardner, where he focused his practice on commercial litigation, labor and employment law, and entertainment law.

Mr. Chiappetta received a BS in marketing from the University of South Carolina, a MA in corporate communication from Rollins College, and he is a graduate of the University of Florida Levin College of Law.

Eric de los Santos

Eric C. de los Santos is assistant general counsel and director of employment law for TrueBlue, Inc., the leading provider of blue collar staffing in the U.S. He leads a team of attorneys and legal professionals that advises the company on all labor and employment issues in the 50 states, Canada and Puerto Rico. He also advises on issues related to information management and social media. He is on the company's government relations team and coordinates lobbying efforts in some of its larger markets.

Prior to TrueBlue, Mr. de los Santos was a plaintiff's employment litigator and tried numerous cases involving employment discrimination, maritime and personal injury law. As some of his clients were undocumented, he presented a CLE on representing the undocumented worker.

Mr. de los Santos currently serves on the Seattle Civil Service Commission. He is very active in various bar and community organizations. He is co-founder and immediate past president of the Filipino Lawyers of Washington and is on the board of the Filipino

Community of Seattle. He is also a former governor of the Washington State Bar Association and is current president of Brown University's Asian / Asian American Alumni Association. He is a frequent speaker on issues of diversity and last year, was awarded the Diversity Champion Award and named an Outstanding Corporate Counsel Finalist by ACC's Washington Chapter.

Mr. de los Santos received his degree in public policy from Brown University and his JD from the University Of Washington School Of Law.

Richard Sedory

Richard Sedory is general counsel, secretary and corporate vice president of legal affairs and administration for Transtar Holding Company, headquartered in Cleveland, OH. Transtar Holding, through its affiliates and subsidiaries, is the world's largest supplier of original equipment and aftermarket replacement parts to automobile transmission and general repair professionals.

Mr. Sedory has extensive experience leading all aspects of legal, human resource and administrative operations functions. He has the unique background of having held executive positions in each discipline across industries, in both large and mid-size companies, with demonstrated success linking employee and legal initiatives to organizational business strategy. He has led several turnarounds, start-ups, consolidations and an IPO; with significant experience in mergers and acquisitions, employment, labor and employee benefit laws, intellectual property, and negotiating and drafting all types of commercial agreements.

Prior to joining Transtar, Mr. Sedory held senior legal, human resources and administrative positions at United Technologies, PNC and Citizens Banks, PrintCafe, and the University of Pittsburgh Medical Center.

Mr. Sedory regularly speaks at his local ACC Chapter events and CLE sessions. He is on the board of Big Brothers Big Sisters of Greater Pittsburgh, and Treesdale Golf & Country Club.

Mr. Sedory has his JD from the University of Pittsburgh School of Law, as well as dual undergraduate degrees in business and political science from the University of Pittsburgh.

Courtney Thompson

Courtney Brevette Thompson serves as vice president employment counsel for Lender Processing Services, Inc. and its more than twenty wholly owned subsidiaries. As the company's sole in-house employment attorney, she has responsibility for all aspects of LPS' labor and employment matters, including drafting employment-related agreements and policies, providing day-to-day preventive counseling, handling all corporate

immigration matters, responding to governmental enforcement agency charges and other investigations related to employment practices, and managing all employment litigation.

Prior to joining LPS, Ms. Thompson practiced labor and employment law in the Atlanta offices of Fisher & Phillips and Kilpatrick, Townsend & Stockton, where she was also an active member of the Junior League of Atlanta. She is currently a member of the Northeast Florida United Way's Women in local leadership.

Ms. Thompson received her BBA from Mercer University and her JD from the University of Alabama.


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How to Keep a Dog from Biting Your Hands when Trying to Feed It

“Some dogs bite, growl and snap at their owner’s hands while being fed, known as ‘dog food aggression’. Showing aggression – even if only at feeding time – can lead to potentially dangerous, violent behavior. It must be stopped as quickly as possible. Most often, it is as simple as finding out why the dog is aggressive during meal time and eliminating the stimulant. But it also requires training to show the dog who’s boss.”

(source: ehow.com)


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How to Keep a Dog from Biting Your Hands when Trying to Feed It


- Are you an Aggressive Dog (if so, why)?
- What's the Stimulant?
- Who's the Boss?

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ORGANIZATIONAL STRUCTURES

Sets the Foundation for the Landscape between Human Resources and Legal




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Organizational Structures

- Common Reporting Relationships (or lack thereof)
 - CEO
 - CAO
 - CFO (. . . really?)




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Organizational Structures

- Staff Size
 - Often difficult to define “HR Staff”
- Industry Variability
 - Production
 - Union
 - Service-related



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Organizational Structures

- “Parkinson’s Law” stage (1950s)
- “Wasteful Bureaucracy” stage (1980s – 1990s)
- The “Strategic Partner” stage (2000s & beyond)
 - Duality of administrative & strategic
 - Functional Hierarchy vs. Business Unit orientation

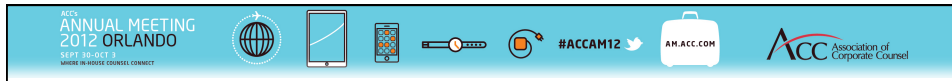


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BOUNDARIES

Preserving the Attorney-Client
Privilege in the HR-Legal Relationship



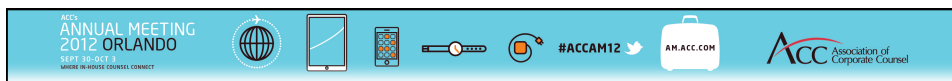
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Privilege Basics

- The Privilege protects communications, not underlying facts
- Attorney/Client Privilege protects confidential communications between attorney and client
- Work Product Doctrine protects information or materials assembled in anticipation of litigation




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Tests: Then & now

- Then: “The Control Group Test”
 - The communication must be between counsel and an employee who is in a position to control, or take a substantial part in, a decision about any action which the corporation may take upon the advice of the attorney
 - Invalidated by *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981)




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Tests: Then & now

- The Control Group Test “frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation.”
- SCOTUS acknowledged that it is frequently the mid-level and lower-level employees who have the relevant information needed by corporate counsel to render effective legal advice.




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Tests: Then & now

- Now: “The Subject Matter Test” (*see Southern Bell Tel. & Tel. Co. v. Deason*, 632 So.2d 1377 (Fla. 1994))
 1. The communication would not have been made but for the contemplation of legal services.
 2. The employee making the communication did so at the direction of his or her corporate superior.



Tests: Then & now


3. The superior made the request of the employee as part of the corporation's effort to secure legal advice or services.
4. The content of the communication relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee's duties.
5. The communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.



Practical Considerations

- Ask: do we want this communication or document to be privileged?
- Do you have "attorneys" hiding under rocks?
- When to engage an outside firm for internal HR investigations and whether the privilege applies (SPOILER ALERT: it doesn't apply)


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ALLOCATION (& *INTERSECTION*) OF RESPONSIBILITIES


How you define roles and put the
relationship into action


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Responsibility Allocation/Intersection

- ***INTERSECTION***: Work TOGETHER to support every aspect of the organization's employment experience and ensure organizational compliance
- ***ALLOCATION***
 - HR: **CREATES, CONSULTS, INVESTIGATES, RECOMMENDS**
 - LEGAL: **REVIEWS, RISK-ANALYSIS, DEFENDS**






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Responsibility Allocation/Intersection

- Review of Employment Concerns and Actions
 - Internal Investigations
 - HR: initial contact, investigates, provides direction
 - LEGAL: reviews recommendations & novel issues
 - Terminations
 - LEGAL: inadvertent “landmines”/legal considerations
 - Agency Charges



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Responsibility Allocation/Intersection

- Benefits
 - FMLA/State Leaves/Company LOAs
 - HR: determines benefit offerings, manages FMLA/LOA
 - LEGAL: “job protection”/ADA review, ensures compliance
- Policy Development
 - Social Media Policies
 - HR: drafts and creates policies in response to organizational needs
 - LEGAL: considers legal effect and enforcement (i.e. NLRB)

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Responsibility Allocation/Intersection

- “Sticky” Matters
 - Layoffs/RIFs
 - HR: Determines scope and criteria (performance-based v. position elimination)
 - LEGAL: WARN, review of methodology, adverse impact analysis
 - Accommodations (Medical/Religious/Gender Identity)
 - HR: Manages “Interactive Process”
 - LEGAL: “Reasonableness” and “Undue Hardship”
 - Labor Relations/Union Avoidance
 - HR: Positive employee relations, hears grievances
 - LEGAL: ULPs/Arbitrations, campaigns (TIPS), negotiation (CBA)

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TENSION BETWEEN LEGAL & HR


HR-ORROR STORIES

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Cast of HR Characters

- Count Dracula - "Could I get an answer before daylight breaks?"
- Little Red Devil – "But LEGAL said it was okay."
- Thing from Addams Family – "Oops, I just hit Reply All."
- The Aswang – HR expert by day. . . Self-proclaimed legal authority by night








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Source of the Tension

- Different views and interests, not necessarily in alignment
- Failure to engage in risk assessment
- Different levels of comfort regarding risk
- Levels of urgency different
- Lack of responsiveness
- Speaking a different language
- Failure to understand and appreciate inner workings of each other's departments
- Lack of familiarity concerning information management systems and processes
- Overlap and/or lack of coordination regarding certain departmental functions


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What HR Thinks of Legal










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How to Ease the Tension

- Understand the HR department, its people, dynamics and internal constraints
- Be an effective communicator and return phone calls even if you don't have an answer
- Make others aware of your timeframe and stick to it
- When rendering advice, don't just quote the regulations but advise on risk and recommend an action
- Recognize and reward the efforts of HR on joint successes
- Draft client advisories in straightforward terms with implications for the business
- Be proactive in providing training on recently enacted laws

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COOPERATION BETWEEN LEGAL/ HR

Putting it All Together –
Implementing a Seamless Team

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Cooperation between Legal/HR

- Communication is Critical Step
- Common Understanding of Roles
- Recognize Distinct Strengths
- Proper Alignment to Organization & Culture
- Shared Goals & Client Service
- Best Practices

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Bite de hand
dat feeds you
it won't feed u know more

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**PRIVILEGED AND CONFIDENTIAL – ATTORNEY WORK PRODUCT
AND ATTORNEY-CLIENT COMMUNICATION**

TO:
FROM: Assistant General Counsel
DATE:
RE: Preservation Directive Relating to Litigation
Jane Smith v. ABC Inc.
Court of Common Pleas of Any County, Pennsylvania, 2012-cv-012345

IMPORTANT: PLEASE READ IMMEDIATELY

This is a matter of importance that relates to pending litigation adverse to ABC Inc. and David Boss, plant manager of our Pittsburgh facility. As Assistant General Counsel, I require your assistance to preserve documents, including electronically stored information, which may relate to the above matter (the "Smith Litigation").

Analysis

Overview. The Smith Litigation involves claims by a former employee (Jane Smith) at our Pittsburgh facility. Smith was involved in a workplace incident on August 30, 2012 with a coworker, James Doe. ABC terminated its employment of Smith and Doe. Smith's complaint alleges various types of employment discrimination, including gender discrimination and retaliation for her efforts at filing a workers compensation complaint. Smith alleges that two male coworkers (Jackson Cole and Mike King) committed similar or more serious workplace infractions without discipline. Smith also alleges she was defamed at some meetings held at Pittsburgh in September 2010. We see no merit to Smith's claims, and we have instructed outside legal counsel to defend the claims. Although we do not believe that the claims against ABC and Mr. Boss are meritorious, it is important that potentially relevant information be preserved. Smith's attorney has requested production of potentially relevant electronically stored information.

Preservation instruction. Accordingly, we need your cooperation to identify and preserve all hardcopy information, such as memos, notes, correspondence, calendars, and personnel files ("Documents"), and electronically stored information, such as computer files, emails, documents stored on hard drives and network shares, structured data in SAP and any other databases, and digital information of all kinds ("ESI") that relate or pertain in any way to the following subjects:

- **ABC's employment of Jane Smith and the termination of her employment, particularly events occurring from September 1, 2010 through August 30, 2012.**
- **ABC's employment of James Doe and the termination of his employment, particularly events occurring from September 30, 2010 through August 30, 2012.**

- **ABC's employment of Jackson Cole and Mike King, and any known incidents they were involved with in the nature of workplace violence or destruction of company property.**
- **All efforts made by Jane Smith to commence a workers compensation claim based on injuries she alleges to have sustained in the workplace on or about August 30, 2012.**
- **Any and all safety stand-down meetings and/or all-employee meetings held at ABC's Pittsburgh facility in September 2010 through August 2012, in which Jane Smith was discussed in any fashion, directly or indirectly.**
- **An August 3, 2012 entry into the Pittsburgh facility by Jane Smith's husband (including any security camera footage).**

Relevant time period. Except where otherwise indicated above, the time period for potentially relevant Documents and ESI is September 1, 2010 through August 30, 2012. Because the dispute is ongoing, potentially relevant Documents and ESI generated or received in the future are also subject to this direction.

Key players. At this time, the individuals most likely to have discoverable Documents or ESI, designated here as the "Key Players," are the following people (note that Smith and Doe are not current employees and will not receive this document):

Jane Smith and James Doe
Jackson Cole
Mike King
Richard Corson
Denise Starr
Josh Puckett
Dave Corson
Bill Anderson
Andy Molner
Jane Lamp

What you must do. The potentially relevant Documents and ESI described above are referred to as "Preserved Information" throughout the remainder of this memo.

Do not destroy, dispose of, move or alter any Preserved Information, whether a draft, a final, or even a duplicate copy. You must suspend your normal routines and practices (if any) regarding deletion or modification of all Preserved Information, even if the Documents or ESI are unused or no longer needed for business purposes. You must take all reasonable actions necessary in order to retain any and all Preserved Information until further notice.

In applying this rule, you should construe the scope of this preservation directive broadly. If you have any questions about whether a Document or ESI constitutes Preserved Information, please call me as soon as possible. Please do not in any way alter, or even copy or resave any

computer records or other ESI, such as emails and documents, which you believe are covered by this Preservation Directive, as these actions may alter certain computer characteristics or metadata of the files that may be important.

Examples of types of materials that must be preserved. Preserved Information may include, but is not limited to, e-mails and attachments, text messages, instant messages, voicemails, word processing documents, calendars, spreadsheets, PowerPoint presentations, databases, security camera footage, telephone logs, contact manager information, and Internet usage files.

Places where Preserved Information might be located. You should preserve hard copy files, computer hard drives, removable media (e.g., thumb drives, CDs and DVDs), PDAs, BlackBerry devices, network shares, and any other locations where Preserved Information might be stored. This directive includes any computer you may have used that stores Preserved Information, including laptops, home computers, or other personal electronic storage devices. It also includes inaccessible storage media, such as back-up tapes, which may contain relevant ESI if such ESI does not exist in any other form.

Collection. You will be contacted soon as to steps that might be taken to collect relevant Documents and ESI. Please do not attempt to do this yourself without first receiving further instructions.

This Notice Supersedes Other Retention Policies. This Preservation Directive supersedes all existing instructions with regard to ABC's records retention policies and will remain in force until further notice.

Thank you for your cooperation and assistance. And again, if you have any questions about the requirements of this directive, or need help to comply with it, please contact me as soon as possible.

Assistant General Counsel
ABC Inc.

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SESSION 505: DON'T BITE THE HAND THAT FEEDS YOU: MANAGING THE LEGAL-HR
RELATIONSHIP

WRITTEN MATERIALS SUBMISSION

Unquestionably, corporate Human Resource professionals benefit from a strong relationship with in-house employment counsel. Paramount to getting the most out of this relationship is establishing and maintaining the attorney/client privilege (the "Privilege"). In-house counsel renders its most effective legal advice and gives its best legal representation when the privilege is carefully safeguarded. Following a brief review of the state of the Privilege as it applies to corporate counsel and client, what follows are specific examples and practical pointers for how the Privilege may or may not apply in communications between Human Resources and Legal.

I. The Control Group Test

Historically, judges and attorneys alike tended to draw analogies, whether intentionally or not, between the Privilege enjoyed by an attorney and his human client on the one hand, and that of corporate counsel and his corporate client on the other. To wit, for decades, the test applied to determine whether the Privilege applied was the Control Group Test. First recognized by *Philadelphia v. Westinghouse Electric Corp*, 210 F.Supp. 483 (ED Pa. 192), petition for mandamus and prohibition denied *sub nom. General Electric Co. v. Kirkpatrick*, 312 F.2d 742 (3rd Cir. 1962), cert. denied, 372 US 943, 83 S.Ct. 937, 9 L.Ed.2d 969 (1963), the Control Group Test looked to whether the employee making the communication was in a position to control, or

even to take a substantial part in, a decision about any action which the corporation may take upon the advice of its attorney. *Id.* at 485.

The Control Group Test was later invalidated by *Upjohn Co. v. U.S.*, 449 US 383 (1981). In that case, the Court recognized the practical problem of the Control Group test. "Such a view, we think, overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Id.* at 390. "the first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant." *Id.* at 390-391.

Although the majority stopped short of adopting a new test to replace the Control Group Test, courts have subsequently adopted what some have called a Subject Matter Test. *See Southern Bell Tel. & Tel. Co. v. Deason*, 632 So.2d 1377 (Fla. 1994).

II. The Subject Matter Test

The subject matter test places a greater emphasis on the content of the communication than the Control Group Test did. Naturally, the communication still must be made with the corporation's attorney and still must relate to legal advice, but no longer does the privilege only apply to the very upper echelon of the corporation, who often do not possess all of the relevant information needed by the corporate attorney to render effective counsel. Rather, the subject matter test recognizes that a corporate attorney may benefit from information provided at various levels within the company in advising a corporate client. The *Deason* court

set forth the following criteria to judge whether a corporation's communications are protected by the Privilege:

1. The communication would not have been made but for the contemplation of legal services;
2. The employee making the communication did so at the direction of his or her corporate superior;
3. The superior made the request of the employee as part of the corporation's effort to secure legal advice or services;
4. The content of the communication relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee's duties; and
5. The communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

Deason at 1383. The subject matter test articulated in *Deason* is the modified version of the Harper & Rowe test detailed in *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (E.D. Mo. 1977)(overturned on other grounds). In that case, the court recognized that the Harper & Rowe test caused critics to fear that corporations would simply start funneling most corporate communications through its attorneys, and therefore adopted Judge Jack B. Weinstein's suggested modifications to avoid potential abuse. See 2 Weinstein's Evidence P 503(b)(04) (1975). The Harper & Rowe test as modified by Judge Weinstein is still used by federal courts today.

III. The Privilege Between Legal and Human Resources

Human Resource professionals frequently take an active role in providing information to in-house employment counsel, either in the compliance context or in anticipation of litigation. However, the information exchanged is not always protected from disclosure. Employers should be especially wary when employing attorneys in non-legal roles. In *Hardy v. New York News, Inc.*, 114 F.R.D. 633 (1987), the employer claimed that material prepared by a manager in its human resources department in connection with its draft affirmative action plan was protected from disclosure by various privileges, including the self-critical privilege, the attorney/client privilege and the work product doctrine. However, none of the withheld documents was prepared by an attorney or addressed to an attorney, and in her deposition, the Human Resource professional testified that she did not understand that she was being directed by counsel. The employer's Vice President and Director of Employee Relations happened to be an attorney, but to the extent that communications were directed to him, there was nothing in them to indicate that his legal advice was being sought. "The attorney-client privilege is triggered only by a client's request for legal, as contrasted with business advice, and is 'limited to communications made to attorneys solely for the purpose of the corporation seeking legal advice and its counsel rendering it.'" *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d at 1037. Ultimately, the court required the employer to produce the withheld documents.

Furthermore, the privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney. *Upjohn* at

395. In *Hardy*, the court noted that most of the documents withheld contained minority utilization rates and other statistics that could not be said to be evaluative and were either already provided or readily available by other sources.

In *Lewis v. Unum Corporation Severance Plan*, 203 F.R.D. 615 (D. Kan. 2001), the plaintiff, whose position was eliminated as a result of a merger, sought benefits under the employer's severance plan. The opinion addresses six categories of documents sought to be protected from disclosure and is an excellent guide for in-house employment counsel and Human Resource professionals alike on the attorney/client privilege and the work product doctrine. For example, the Privilege would have protected certain communications with counsel related to the denial of severance benefits to a departed employee, except that the severance plan's administrator—as a fiduciary acting on behalf of the beneficiaries of the plan, including the plaintiff—was copied on most of the written communications. Similarly, the minutes of a meeting which both in-house and outside counsel attended was found by the court to relate primarily to the administration of the plan, which the courts had long since settled could not be protected from disclosure.

CONFIDENTIAL REDUCTION-IN-FORCE SELECTION TOOL

Business Unit:	
Department/Team Name:	
HR Contact(s):	
Reasons for RIF:	
Factors Considered in Making Selections:	

Date Completed: [insert date]

Evaluators	
Name	Title

Place an "x" in the appropriate box below

Employee Name	Job Title	Hire Date	Counseling During Past 90 Days?	Most Recent Performance Review, Productivity Score or Other Performance Measurement	Selected for RIF	Not Selected for RIF	Selection Comments